MISCELLANY.

Determination by a Jury of a Person's Age from Inspection.—The Illinois Law Review for February, 1916, contains a characteristically vigorous criticism by Professor Wigmore on certain recent decisions of the Supreme Court of Illinois, which is in part as follows:

"Two centuries and a half ago the law allowed a jury to determine the age of an alleged minor by inspection (1558, Langley *v.* Mark, Cary, 53; 1586, Wood *v.* Wageman, Tothill, 72). There was even a writ for the purpose, which ordered 'Venire facias ut per aspectum corporis sui constare poterit praefatis justicus nostris si praedictus A. sit plenae aetatis' (1592, Abbott of Strata Marcella's case, 9 Co. Rep. 31a).

'But today, in an enlightened democracy, which is proud of having thrown off the trammels of ancient tradition, the opposite rule is put forth as a fundamental truth of basic law. In People *v.* Kielczewski (269 Ill. 293, 109 N. E. 980, October 27, 1915), the accused being charged with robbery, and the statute providing that persons found by the jury to be between the ages of ten and twenty-one should be sentenced to a reformatory, not a penitentiary, the jury found the defendant to be 'about twenty'; he himself had testified that he was twenty-one, and the only other evidence was his appearance and demeanor before the jury. The finding was held void, the appearance alone was 'not a reliable standard, and 'there could be no review if such evidence alone sufficed,' and presumably, therefore, there must be also at least one witness to age. On this principle, that 'jurors cannot make up their verdict on any disputed fact (exclusively) from their own individual observation,' the court had already held in an analogous case that age could not be determined by inspection alone (Wistrand *v.* People, 213 Ill. 72, 72 N. E. 748).

"Now, first, as to the history of this doctrine, and then as to its common sense.

"The rule started back in 1867 in Indiana (Stephen *v.* State, 28 Ind. 272), and was accepted in Texas in 1891 (McGuire *v.* State, Tex. App., 15 S. W. 917), and then nowhere else in Anglo-American law until by the Illinois Supreme Court in 1904, in Wistrand *v.* People (supra). The general principle, however, that what a jury sees is 'not evidence,' because it is not amenable to criticism on review, was foisted on our State law in one other application, viz, a view of a place by a jury, in 1894 (Vane *v.* Evanston, 150 Ill. 616, 621, 37 N. E. 901); although the original doctrine in this State had been the orthodox one (1874, Peoria & A. & D. R. Co. *v.* Sawyer, 71 Ill. 36: 'The facts derived from such examination would still have been a part of the evidence'), and although only five other States, so far as appears, have ever countenanced the heresy.

"Now, we ask, why should the court of Illinois pick out an heretical

doctrine and abandon in its favor the common sense common law of three centuries? And why should it do this in the face of its own prior orthodox doctrine? We are so frequently rebuked by courts for expecting them to introduce an innovation which, as they regretfully admit, is highly desirable, and are told that a change of the law is something for the legislature only. And yet here a court is found not only changing the common Anglo-American law of three centuries, and changing its own prior state law, but changing to adopt a heresy which ought itself to have been reformed away if it ever had been our law.

"That this heresy lacks common sense is plain enough. Every judge and every employer and every banker and every liquor seller and everybody else that ever grew up to years of discretion has always acted upon appearance in determining whether a person is under age. That on the border line there may be instances in which this evidence alone might be insufficient may be conceded. But that is no reason why it may not be sufficient in all other cases, nor any reason for a fixed rule that it shall never be sufficient. And especially is it a poor rule when it is based on the other modern heresy of a very few courts that 'what a jury sees is not evidence.'"

In our own state § 817 of the Penal Law expressly provides that "whenever in any legal proceedings it becomes necessary to determine the age of a child, the child may be produced for personal inspection to enable the magistrate, court or jury to determine the age thereby."

The reason given in the Wistrand case for the Illinois rule that a person's appearance as evidence could not be preserved in a bill of exceptions for use on appeal, is not practically important. In the Kielczewski case the doctrine stated in Elliott on Evidence is approved that a witness, after describing the appearance of a person as best he can, may give an opinion of his age. Of course such descriptions would go into the record and could be scrutinized on review. But they would be apt to be of a more or less general character and blind rather than distinctive. Where a person is produced before a jury each of its twelve members can observe all the points that witnesses would describe and summarize them in a collective opinion and verdict. It has been held in other jurisdictions that the personal appearance of a person whose age is in question may be considered by the jury and that a person may be produced before a jury to enable them to judge as to his being a minor (Hermann *v.* State, 73 Wis. 246; Comm. *v.* Emmons, 98 Mass. 6; Comm *v.* Phillips, 162 Mass. 504).

In Chamberlayne on Evidence (volume 3, section 2048) it is stated that "where a person whose age is in question is present in court, or an inanimate object is submitted to the inspection of the jury,

the latter will be permitted to draw the necessary inference for themselves, unassisted by witnesses, ordinary or skilled."

There is something to be said in favor of the particular ruling in People *v.* Kielczewski outside of the points above discussed. In that case there was more than opinion founded on observation. The defendant had testified as to his own age. This is in the nature of fact, not mere opinion. "A person's age may be a question of pedigree (citing authorities), and he may testify to his own age, stating what he learned thereon from deceased parents, from family traditions, etc. (citing authorities). Sometimes his testimony has been received though his parents were still living (citing authorities)." (Chase's Stephen's Digest of the Law of Evidence, 2d ed., p. 104.) Moreover, the defendant was, according to the finding of the jury and his own testimony, *about* twenty or twenty-one years of age, and it was improbable that he would have given testimony against his own interest, subjecting himself to a penitentiary instead of a reformatory sentence, unless he was telling the truth. Remembering that opinion evidence cannot be more than an approximation, it might have been held under all the circumstances that the jury's finding was contrary to the weight of evidence.

The Supreme Court of Illinois, however, embraced the occasion to reiterate the rule that Professor Wigmore criticises, and we think he is justified in his attack on the heresy that "what a jury sees is not evidence," with its corollary that a jury ought not to be permitted in any case to base a finding as to the age of an alleged minor exclusively on their own observation of his appearance and demeanor.—N. Y. Law Journal.

The Duchess of Kingston's Case.—There are some litigants who attain a sort of legal immortality by reason of cases in which they may happen to have been concerned being always quoted by their names. For instance, there is our old friend "Taltarum" with whose case we have had a friendly acquaintance ever since we began to explore the mysteries of the law of real estate. There is the immortal "Shelley," not by any means the poet of that name, but he whose "case" is discussed in so many pages of our law reports, not to speak of many other individuals whose cases are "as familiar in our mouths as household words." Not the least well known of these legal immortals is "the Duchess of Kingston" a frail beauty of the days when George the Second and George the Third were Kings. "The Duchess of Kingston's case" is to be found among Smith's Leading Cases, and it is reported at length in 20 State Trials, p. 355; but probably not very many of those who find the case quoted as authority take the trouble to find out what was the nature of this *cause celèbre*. If they were to do so they would find it really more

entertaining than many a novel; and because we believe its particulars are not very generally known we think it worth while to give some account of it.

It is interesting not only for the various questions of law raised in the course of the trial, but also for the romantic incidents which gave rise to the prosecution, because the case was a prosecution before the Peers for bigamy, or polygamy as it is styled in the Royal Commission directing the trial.

One peculiarity about the case is this, that the accused was found guilty and therefore she was not in fact "the Duchess of Kingston," and the case which has been quoted so oft as "the Duchess of Kingston's case" was not really the Duchess of Kingston's, but the Countess of Bristol's.

The case illustrates the loose state of the marriage laws in the time of George II. The heroine of the case was born Elizabeth Chudleigh and at the time of her first marriage she was a maid of honour to the Princess Royal. In the month of June, 1744, she met the Hon. Augustus John Harvey at the Winchester races, he being then a youth of seventeen, and in the Naval service, Miss Chudleigh was then eighteen and she was on a visit at a place near by called Lainston, where her aunt, a Mrs. Hamner, was staying. Lainston was a diminutive parish. It consisted of the house in which Miss Chudleigh was staying and a church which was in the garden of the house. Mr. Harvey visited Miss Chudleigh at this house, and a secret marriage between them was agreed on, and the Rev. Mr. Ames, the parson of Lainston, agreed to solemnize it. About eleven o'clock at night the bridal pair, accompanied by the aunt, Mrs. Hamner, and two gentlemen went to the church in the garden, and the marriage was solemnized by the light of a candle carried in the hat of one of the gentlemen. Besides the parties above mentioned, a confidential servant named Ann Cradock was present, she being charged to take care that none of the other servants should have any notice of what was going on. Why it was that the marriage was to be kept secret does not clearly appear. It is alleged because of certain circumstances in Mr. Harvey's family; the tender years of the bridegroom and his inability to maintain his bride, and the probable unwillingness of the latter to forfeit the post she held as maid of honour, may also have had weight in determining to keep the marriage secret. The union resulted in the birth in 1746 of a son, who, however, shortly afterwards died in infancy. This fact also was kept secret from all but a few persons. Thereafter a coolness arose between the parties, and they ceased all cohabitation, the lady continuing to pose as a spinster. In 1759, after she had been living separate from her husband about twelve years, the eldest son of the Earl of Bristol having died, the lady's husband became heir apparent to his father with the immediate possibility of succeeding

to the peerage, as his father was ill. His wife then bethought her that, in case such an event happened, it might be desirable to have some authentic record of her marriage. She accordingly proceeded to Winchester where Mr. Ames then lived, and found him, on what proved to be his death bed. A book was procured and an entry of the marriage was made by him therein. This book was sealed up and left with a friend of the lady, to be guarded as a secret not to be disclosed unless required by the lady. The person with whom it was deposited, however, died and the book was found after his death by a member of his family, and being apparently a parish register was forthwith handed over to the rector of the parish of Lainston, in whose custody it subsequently remained, and proved eventually a part of the evidence for the prosecution. The Earl of Bristol having recovered his health, the prospect of the husband's succession to the title became more remote, and the Duke of Kingston having become enamoured of the lady she seems to have resolved that the attractions of a ducal coronet were superior to those of an earl's. In the *"National Biography"* it is said she became the Duke's mistress; at all events her husband threatened her with a suit for divorce, and intimated that she should assist him in getting a decree in the Ecclesiastical Court, with a view to his ultimately getting an Act of Parliament dissolving the marriage. This she indignantly refused to do; but as both parties were really desirous of getting rid of the marriage, it was thought by the legal advisers of the lady that the desired result might be attained by a suit for jactitation of marriage, which the lady should bring against her husband. This suit was accordingly brought, and not very strenuously defended by the husband, and, for lack of proof of any valid marriage having taken place, a decree was pronounced in the lady's favour. She appears to have been advised that she might now safely marry the Duke who was anxious to marry her, though he declined to do so until the doubts as to the first marriage were set at rest. The Duke it appears was cognizant of the proceedings in the jactitation suit, and took a warm interest therein, and shortly after the decree was pronounced went through a form of marriage with the lady. During his lifetime no question was raised as to the validity of this pretended marriage, but after his death his nephew, who was his heir at law, instituted proceedings in Chancery, and also a criminal prosecution for bigamy against the lady. She claimed a right to be tried for the alleged crime by her peers, and as, even if she was not the Duchess of Kingston, she must have been the Countess of Bristol, for by this time her husband had succeeded to the title, it is clear her claim was well founded, and was acceded to; and a Royal Commission was issued for her trial before the Peers in the Court of the Lord High Steward. Accordingly, on the 15th April, 1776, the trial began. The stately ceremony which marked the proceedings

is duly recorded in the pages of the State Trials and the names of the numerous peers who took part in the trial are to be found on p. 623. The prosecution was led by Attorney-General Thurlow (afterwards a Lord Chancellor). The judges of the Common Law Courts were in attendance. Lords Mansfield and Camden took part, but whether in their capacity as peers, or as common law judges is not clear, possibly they were there in both capacities. Lord Camden certainly spoke for the judges on the questions of law submitted to them. At all events there was a great array of legal talent both at the bar and among the peers, and it is for that reason that the conclusions of their Lordships on the various legal points arising in the course of the trial constitute such high authority.

The case was remarkable for the singular step taken *in limine* by the prisoner at the bar. After the reading of the indictment, to which she pleaded "not guilty" and claimed to be tried "By God and my peers," and before the case was opened by counsel for the Crown, she claimed the right to put in evidence the decree in the jactitation suit, which she claimed constituted a bar to the prosecution. This point was argued at some length by counsel, but was disallowed. The evidence was then called, the record of the marriage which the prisoner had herself procured to be made was read against her, and Ann Cradock, the confidental servant, testified to the fact of the marriage: all other eye-witnesses being then dead. In the course of the trial several questions of law arose. (1) As to the effect of a judgment in a suit for jactitation of marriage. How far, if at all, it is conclusive.—How far, if at all, it may be controverted. The points decided have a wide reaching effect on the law of evidence. It was held that the judgment in question was not conclusive, and, even if it were conclusive between the parties, it would not be so as against the Crown, or a third party. (2) Then there was the claim of the surgeon who had witnessed the birth of the child, that he should not be required to disclose facts learned by him professionally to the prejudice of his patient, which was disallowed. (3) The claim of a noble lord that he should be excused from answering as to private and confidential statements made to him by the accused, which was also disallowed. (4) The claim of a solicitor of the Earl of Bristol to be excused from disclosing what he had learned from Ann Cradock when he was making investigations on behalf of the Earl in the jactitation proceedings, which was also overruled as the fact in question was not "a secret of his client."

But the case is also interesting for the light it throws upon that extraordinary method devised by our ancestors for alleviating the savagery of the former criminal law of England, and known as "benefit of clergy."

Benefit of clergy was something like the well known dog law,

that a dog is entitled to have one bite, because, according to this privilege accorded to certain criminals, they might commit one felony with practical impunity. This privilege by a singular inconsistency was accorded to the literate members of the community, who by reason of their superior intelligence ought to know better than to commit crimes, while it was denied to the most ignorant who had more excuse for falling into crime. The capacity to read however was the sole condition required to constitute the criminal "a clerk" and thus entitled to claim the benefit of clergy. For many felonies, bigamy included, benefit of clergy was claimable by the convict. But here again the old English criminal law made a further distinction in criminals. Commoners who claimed the benefit were to be burnt with a hot iron in the presence of the court "on the brawn of the thumb" with the letter M in case of murder, and with the letter T for any other offence, and were further subject to imprisonment for a period in the discretion of the court not exceeding a year; but (as their Lordships, on the advice of the Common Law judges, found in the Duchess of Kingston's case) a peer and a peeress were exempt both from burning in the hand, and also from imprisonment. The result of this celebrated trial was therefore somewhat lame and impotent, for, although the culprit was found guilty of the offence charged yet, by reason of the privilege above referred to, the sentence of the court was "Madame, you are discharged, paying your fees."—Canada Law Journal.

Negligence in Knocking Man Out of Tree.—Ordinarily one would be inclined to doubt the truthfulness of the statement or the validity of a court's holding, that a railroad is liable for knocking a man out of a tree with a trestle and causing his death by drowning. Yet it is illustrated by the following excerpts from San Antonio & A. P. Ry. Co. *v.* Behne (Tex. Civ. App.), 198 S. W. 680, 682, 685, a recent decision based upon a Texas statute creating a cause of action in favor of near relatives of a person whose death is caused by the neglect or carelessness of any railroad, etc.. and another statute requiring railroads to construct all culverts and sluices required by the lay of the land:

"So, if it be true, as alleged in plaintiffs' petition, and as in substance found by the jury, that in the construction of its roadbed across Elm creek and the valley thereof appellant failed to leave sufficient openings to permit the flow of water as required by the natural lay of the land for the necessary drainage thereof, and that as a result of such failure the accumulation of flood waters produced such pressure upon the trestle as caused it to collapse, float down the stream, and knock the deceased out of the tree in which he had taken refuge, and thereby caused his death, then appellant should

be held liable to appellees, unless it be, as contended by counsel for appellant, that the failure of appellant to perform its statutory duty in the construction of its roadbed was not the proximate cause of the death of the deceased. * * * In the present case proof shows that persons were in the habit of resorting to the place where the deceased and his two brothers were camped, and therefore appellant was required to anticipate that a sudden overflow of the stream might prevent one or more persons who were camping at that place from making their escape in the usual way, and result in such persons seeking protection by climbing trees; and that, in the event of the trestle breaking loose and washing away, in floating down the stream it might tear down trees in which persons had taken refuge. We do not hold that, in order to create liability, it was necessary for appellant to have anticipated that some person would *probably* be located in a tree top on such occasions, nor do we believe that the law requires such a holding in order to establish liability. It should have anticipated those things which *might* happen, even if such occurrences would be unusual."

A judgment against the railroad for $2,500 was affirmed.

IN VACATION.

The late Eugene F. Ware had filed a demurrer, and was arguing the case before Judge Samuel F. Miller. The latter stopped counsel with the remark: "Mr. Ware, there is no use taking up any more time of this court. Why, that question has been decided against you by every court in Christendom."

"Oh, yes," replied Mr. Ware, in his genial and pleasant way, "I am aware of that, your Honor, but I know your Honor occasionally makes decisions contrary to every court in Christendom and I thought perhaps this would be one of the times."

"Go on, Mr. Ware, go on, sir, I will hear you. Go, on, sir."